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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA

8 Civil No. 15-cv-0627-JAH (JMA)

9 HELAINA WASHINGTON,
10 individually and on behalf of others
similarly situated,

11 Plaintiff

**ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS OR TRANSFER FOR
IMPROPER VENUE (Doc. # 14)**

12 v.

13 CASHFORIPHONES.COM, fka
14 Cashforlaptops.com,

15 Defendant.
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18 INTRODUCTION

19 Pending before the Court is Defendant's motion to dismiss or transfer
20 for improper venue. (Doc. # 14). After careful review of the parties' pleadings,
21 and for the reasons set forth below, the Court DENIES Defendant's motion.

22 FACTUAL BACKGROUND

23 Defendant is an internet-based company that purchases used electronic
24 devices from individuals. Individuals desiring to sell their used iPhones to
25 Defendant input the model and condition of their iPhone on Defendant's
26 website and are instantly provided an initial quote of the amount that
27 Defendant will pay for the iPhone. All individuals who wish to sell their
28 iPhones to Defendant via Defendant's website are required to click a box

1 signifying that they agree to Defendant's Terms and Conditions ("Terms").
2 The Terms contain a mandatory forum selection and choice of law clause.
3 Specifically, the clause provides:

4 THESE TERMS AND CONDITIONS ARE
5 GOVERNED BY, AND CONSTRUED IN
6 ACCORDANCE WITH, NEVADA LAW, AND NO
7 CONFLICT OF LAWS OR PROVISIONS OF ANY
8 JURISDICTION WILL APPLY TO THESE TERMS
9 AND CONDITIONS. BY CHECKING THE BOX
10 STATING "I AGREE TO THE TERMS AND
11 CONDITIONS" AND THEREAFTER CLICKING ON
12 "SELL NOW," YOU ARE AUTHORIZING THIS
13 TRANSACTION PURSUANT TO ALL SUCH
14 TERMS AND CONDITIONS. CHECKING THE
15 BOX "I AGREE" FURTHER ACKNOWLEDGES
16 YOUR AGREEMENT THAT ANY ACTION AT LAW
17 OR IN EQUITY ARISING OUT OF OR RELATING
18 TO THESE TERMS AND CONDITIONS WILL BE
19 FILED ONLY IN STATE OR FEDERAL COURT
20 LOCATED IN RENO, NEVADA AND YOU HEREBY
 IRREVOCABLY AND UNCONDITIONALLY
 CONSENT AND SUBMIT TO THE EXCLUSIVE
 JURISDICTION OF SUCH COURTS OVER ANY
 SUIT, ACTION, OR PROCEEDING ARISING OUT
 OF THESE TERMS AND CONDITIONS.

21 (Doc. # 1, Exh. A). Once a party agrees to the Terms, Defendant sends the
22 party packaging with pre-paid postage in which the party can ship his iPhone
23 to Defendant. Upon receiving the iPhone, Defendant may revise its initial
24 quoted price and notify the party via email of any change. The party then has
25 three days to contact Defendant and reject the revised price, otherwise, per
26 the Terms, the party is deemed to have accepted the new offer.

27 Plaintiff is woman who lives in La Mesa, California, and sold her used
28 iPhone to Defendant. In January, 2015, Plaintiff received an initial quote of

1 \$88 for her used iPhone from Defendant's website. Plaintiff then sent her
2 used iPhone to Defendant. On February 2, 2015, Defendant sent Plaintiff a
3 revised offer of \$9 via email. That same day, Plaintiff emailed Defendant
4 declining its revised offer and requesting Defendant return her iPhone.
5 Plaintiff also called Defendant several times, but was either put on hold or her
6 call was not answered. When Plaintiff finally spoke with someone at
7 Defendant's company, Plaintiff was informed that she could no longer reject
8 Defendant's revised offer because the three-day rejection period had expired.
9 Defendant deposited \$9 in Plaintiff's PayPal account on February 6, 2015.

10 PROCEDURAL BACKGROUND

11 On March 19, 2015, Plaintiff filed a class action complaint against
12 Defendant alleging violations of: (i) the Consumer Legal Remedies Act
13 ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, (ii) California Business and
14 Professions Code § 17200, *et seq.*, (iii) California Business and Professions
15 Code § 17500, *et seq.*, (iv) Cal. Civ. Code § 1573, (v) fraudulent inducement
16 and representation, (vi) breach of contract, (vii) conversion, (viii) breach of
17 the implied covenant of good faith and fair dealing, (ix) fraud, (x) fraudulent
18 misrepresentation, and (xi) negligent misrepresentation. (See Doc. # 1). On
19 June 18, 2015, Defendant filed a motion to dismiss or transfer the action for
20 improper venue. (Doc. # 14). Plaintiff filed an opposition to Defendant's
21 motion to dismiss on August 10, 2015 (Doc. # 20), and Defendant filed a
22 reply on August 17, 2015 (Doc. # 24).

23 LEGAL STANDARD

24 The court applies federal law to the interpretation and enforcement of a
25 forum selection clause. Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d
26 509, 513 (9th Cir. 2009). Federal Rule of Civil Procedure 12(b)(3) permits a
27 defendant to move to dismiss a complaint for improper venue. Plaintiff bears
28 the burden of demonstrating venue is proper. See Piedmont Label Co. v. Sun

1 Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979). In considering a
 2 motion to dismiss under Rule 12(b)(3), a court need not accept the pleadings
 3 as true and may consider facts outside the pleadings. See Argueta v. Banco
 4 Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996). Similarly, 28 U.S.C. §
 5 1406(a) permits a district court to dismiss or transfer an action laying venue
 6 in the wrong district. However, a court shall not dismiss an action pursuant to
 7 Rule 12(b)(3) or § 1406(a) when venue is established under 28 U.S.C. § 1391
 8 in the forum in which the action was initiated. See Atl. Marine Constr. Co., v.
 9 U.S. District Court, 134 S. Ct. 568, 577 (2013).

10 Venue is proper under § 1391 in: (1) a judicial district in which any
 11 defendant resides if all defendants reside in the same state, (2) a judicial
 12 district in which a substantial part of the events or omissions giving rise to the
 13 claim occurred, or (3) any judicial district in which any defendant is subject to
 14 the court's personal jurisdiction if there is no district in which the action may
 15 otherwise be brought. 28 U.S.C. § 1391(b). Venue may be properly
 16 established under § 1391 irrespective of whether the parties' contract contains
 17 a forum selection clause. Atl. Marine, 134 S. Ct. at 578.

18 When venue is properly established under § 1391(b), a party may
 19 enforce a forum selection clause through a motion to transfer under 28 U.S.C.
 20 § 1404(a). Id. at 579. Section 1404(a) states, "For the convenience of parties
 21 and witnesses, in the interest of justice, a district court may transfer any civil
 22 action to any other district or division where it might have been brought or to
 23 any district or division to which all parties have consented." District courts
 24 generally have broad discretion in deciding a motion to transfer under §
 25 1404(a). Ventress v. Japan Airlines, 486 F.3d 1111, 1118 (9th Cir. 2007).
 26 "The calculus changes, however, when the parties' contract contains a valid
 27 forum-selection clause.... [A] valid forum-selection clause should be given

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controlling weight in all but the most exceptional cases.” Atl. Marine, 134 S. Ct. at 581 (internal quotations and alterations removed).

“A forum selection clause is presumptively valid; the party seeking to avoid a forum selection clause bears a ‘heavy burden’ to establish a ground upon which [the court] will conclude the clause is unenforceable.” Doe I v. AOL LLC, 552 F.3d 1077, 1083 (9th Cir. 2009) (quoting M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 17 (1972)). However, “a forum selection clause is unenforceable ‘if enforcement would contravene a strong public policy of the forum in which suit is brought....’ ” Doe I, 552 F.3d at 1083 (quoting Bremen, 407 U.S. at 15).

DISCUSSION

A. Motion to Dismiss Pursuant to 12(b)(3) and U.S.C. § 1406(a)

Defendant argues that Plaintiff’s complaint should be dismissed because Plaintiff agreed to the Terms, which include a mandatory forum selection clause, the forum selection clause covers Plaintiff’s claims, Plaintiff has not sufficiently rebutted the presumption of enforceability that accompanies forum selection clauses, and public interest factors favor enforcement of the forum selection clause. In opposition, Plaintiff argues her complaint should not be dismissed because a motion to dismiss is not the proper procedural mechanism to enforce a forum selection clause under Atlantic Marine. Plaintiff further argues the contract is unenforceable because the Terms do not adequately identify the contracting parties inasmuch as they refer to Defendant as “we” and “our company and its affiliates and subsidiaries” without naming the company or its related companies.

As discussed above, a court may not dismiss a complaint under Rule 12(b)(3) or § 1406(a) when venue is proper under § 1391. See Atl. Marine, 134 S. Ct. at 577–79. Plaintiff contends that “it is undisputed this case meets

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1 the § 1393(b) [sic]¹ criteria, since ‘a substantial part of the events . . . giving
 2 rise to the claim occurred’ in this district and the defendant corporation does
 3 business in this district.” (Doc. # 20, pg. 14). Plaintiff explains that she
 4 attempted to sell her iPhone to Defendant and accepted Defendant’s Terms
 5 from her home computer in La Mesa, California, which is located in the
 6 Southern District of California. Id. at 6. Defendant sent packaging with pre-
 7 paid postage to Plaintiff’s home in the Southern District of California, so
 8 Plaintiff could send her iPhone to Defendant. Id. Defendant does not dispute
 9 that Plaintiff established venue under § 1391. Rather, Defendant asserts that
 10 establishing proper venue under § 1391 is insufficient to preclude the
 11 enforcement of the forum selection clause. (See Doc. # 14, pg. 7–8, 11). In
 12 regards to its motion to dismiss, Defendant is mistaken.

13 The Supreme Court clearly stated in Atlantic Marine that a complaint
 14 shall not be dismissed pursuant to Rule 12(b)(3) and § 1406(a) if venue is
 15 properly established under § 1391. 134 S. Ct. at 577–79. If venue is
 16 established under § 1391, the action cannot be dismissed under Rule 12(b)(3)
 17 or § 1406(a), but must be enforced via a motion to transfer under § 1404(a)
 18 if seeking a different federal forum or under the doctrine of *forum non*
 19 *conveniens* if seeking a state forum. Id. at 579–80. The Court finds that
 20 Plaintiff properly established venue in the Southern District of California
 21 under § 1391(b)(2) because “a substantial part of the events or omissions
 22 giving rise to the claim occurred” within the confines of the Southern District
 23 of California. Accordingly, Defendant’s motion to dismiss pursuant to Rule
 24 12(b)(3) and § 1406(a) is DENIED.

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27 ¹ Although Plaintiff cites to § 1393(b) rather than § 1391(b) while arguing that venue is proper,
 28 the Court construes Plaintiff’s argument under § 1391 as Plaintiff cited to § 1391 in her discussion as
 to venue and directly quoted the statutory language of § 1391(b) following her cite to § 1393(b).

1 To the extent Defendant argues for dismissal under the doctrine of *forum*
 2 *non conveniens*, Defendant's motion is DENIED.² "[T]he appropriate way to
 3 enforce a valid forum selection clause pointing to a state or foreign forum is
 4 through the doctrine of *forum non conveniens*." Atlantic Marine, 134 S. Ct.
 5 at 580. The forum selection clause in Defendant's Terms points to either state
 6 or federal courts in Nevada. However, Defendant's argument based on *forum*
 7 *non conveniens* only applies to Defendant's attempt to dismiss the action
 8 insomuch as the Terms' forum selection clause points to Nevada state courts,
 9 which Defendant cannot do.

10 When a California plaintiff files an action in California alleging
 11 violations of the CLRA, a court may not dismiss the action for improper venue
 12 based on a forum selection clause designating an alternate state forum that
 13 lacks the protections afforded by the CLRA. See Doe 1 v. AOL LLC, 552 F.3d
 14 1077, 1083–84 (9th Cir. 2009); Bayol v. Zipcar, Inc., No. 14-cv-02483-TEH,
 15 2014 WL 4793935, *4 (N.D. Cal. Sept. 25, 2014). To do so amounts to a
 16 waiver of the remedies provided by California's consumer law, and any such
 17 waiver is void and in violation of California public policy. See Doe 1, 552
 18 F.3d at 1084. The application of Nevada law in this case "would effect the
 19 waiver of California's unwaivable consumer remedies." Bayol, 2014 WL
 20 4793935, at *4. Therefore, Defendant's motion to dismiss for *forum non*
 21 *conveniens* is DENIED.

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 24 ² Defendant's motion to dismiss is based on Rule 12(b)(3) and § 1406(a). (See Doc. # 14, pg.
 25 1–2) (stating in its introductory statement that "Cashforiphones.com moves to dismiss the Complaint
 26 for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) and 28 U.S.C. § 1406(a)" and
 27 requesting the Court "dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(3) and 28
 28 U.S.C. § 1406(a)"). However, later in its motion, Defendant asks the Court to dismiss Plaintiff's
 complaint "on the ground of improper venue/*forum non conveniens*." Id. at 13. After Plaintiff correctly
 asserts in her opposition that dismissal pursuant to Rule 12(b)(3) and § 1406(a) is not warranted when
 venue is established under § 1391, Defendant more aggressively argues in its reply that its motion to
 dismiss is based on the doctrine of *forum non conveniens* and should be granted thereon. (See Doc. #
 24, pg. 3–4).

1 B. Motion to Transfer

2 Although Defendant titles its motion a Motion to Dismiss or Transfer
 3 for Improper Venue, Defendant's motion only requests dismissal. (See Doc.
 4 # 14). Defendant argues exclusively for dismissal asserting that "the interests
 5 of justice do not support a transfer of the matter" and "transfer should not be
 6 ordered." Id. at 14. After Plaintiff correctly asserts in her opposition that,
 7 under Atlantic Marine, dismissal pursuant to Rule 12(b)(3) and § 1406(a) is
 8 not warranted when venue is established under § 1391, Defendant changes its
 9 position in its reply, requesting for the first time that the action be transferred
 10 pursuant to § 1404(a) if the Court does not grant a dismissal. (Doc. # 24, pg.
 11 5). In its reply, Defendant attempts to argue that its motion sought a transfer
 12 all along because it was titled accordingly and because Defendant cited
 13 Atlantic Marine, "and moved for dismissal or transfer, in line with Atlantic
 14 Marine's analysis." (Doc. # 24, pg. 4).

15 The Court is not persuaded. "The district court need not consider
 16 arguments raised for the first time in a reply brief." Zamani v. Carnes, 491
 17 F.3d 990, 997 (9th Cir. 2007). Defendant never requested a transfer pursuant
 18 to § 1404(a) in its motion and specifically argued against a transfer pursuant
 19 to § 1406. (See Doc. # 14, pg. 14). Defendant clearly raises the argument
 20 that the action should be transferred for the first time in its reply. Defendant's
 21 pseudo-request for a dismissal for *forum non conveniens* does not amount to
 22 a request for transfer under § 1404(a). "[Section] 1404(a) transfers are
 23 different than dismissals on the ground of *forum non conveniens*." Piper
 24 Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981). Therefore, Defendant
 25 cannot assert that he requested a motion to transfer pursuant to § 1404(a) in
 26 his motion. Accordingly, the Court DENIES Defendant's request for a transfer
 27 without prejudice because it was not properly raised.

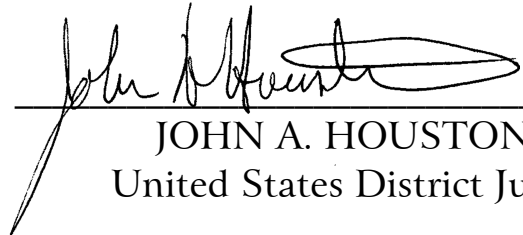
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1 CONCLUSION

2 For the reasons stated above, the Court finds dismissal based on the
3 forum selection clause is not proper as the Plaintiff has established venue
4 under § 1391. Further, the Court finds that Defendant failed to properly
5 request a transfer because Defendant did not present that argument until its
6 reply brief. Accordingly, Defendant's motion to dismiss or transfer the action
7 for improper venue is DENIED.

8 IT IS SO ORDERED.

9 Dated: February 26, 2016

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12 JOHN A. HOUSTON
13 United States District Judge
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